

\*E-Filed 2/27/14\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

KEVIN EARL HOLMES,

Plaintiff,

v.

MARTIN HOSHINO, et al.,

Defendants.

No. C 13-1015 RS (PR)

**ORDER OF SERVICE;**

**ORDER DIRECTING DEFENDANTS  
TO FILE DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION;**

**INSTRUCTIONS TO CLERK**

**INTRODUCTION**

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The original complaint was dismissed with leave to file an amended complaint, which he has filed and which contains cognizable claims. Accordingly, defendants are directed to file a dispositive motion or notice regarding such motion on or before June 1, 2014, unless an extension is granted. The Court further directs that defendants are to adhere to the new notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

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1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and  
 2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may  
 3 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*  
 4 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*  
 5 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

6 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
 7 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)  
 8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
 9 plausibility when the plaintiff pleads factual content that allows the court to draw the  
 10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
 11 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions  
 12 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from  
 13 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).  
 14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)  
 15 that a right secured by the Constitution or laws of the United States was violated, and (2)  
 16 that the alleged violation was committed by a person acting under the color of state law. *See*  
 17 *West v. Atkins*, 487 U.S. 42, 48 (1988).

## 18 **B. Legal Claims**

19 Plaintiff alleges that (1) Dr. Clarene David, a physician at San Quentin State Prison,  
 20 and San Quentin nurses (2) Jimenez, (3) Mary and (4) M. Mutha, were deliberately  
 21 indifferent to plaintiff’s serious medical needs, in violation of the Eighth Amendment.  
 22 Liberally construed, these claims are cognizable under § 1983.

## 23 **CONCLUSION**

24 For the foregoing reasons, the Court orders as follows:

- 25 1. The Clerk of the Court shall issue summons and the United States  
 26 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all  
 27 attachments thereto, and a copy of this order upon (1) Dr. Clarene David, a physician at San  
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1 Quentin State Prison, and San Quentin nurses (2) Jimenez, (3) Mary and (4) M. Mutha. The  
2 Clerk shall also mail courtesy copies of the complaint and this order to the California  
3 Attorney General's Office.

4 2. No later than ninety (90) days from the date of this order, defendants shall file a  
5 motion for summary judgment or other dispositive motion with respect to the claims in the  
6 complaint found to be cognizable above.

7 a. If defendants elect to file a motion to dismiss on the grounds plaintiff  
8 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
9 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,  
10 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810  
11 (2003).

12 b. Any motion for summary judgment shall be supported by adequate  
13 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
14 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
15 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion  
16 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to  
17 the date the summary judgment motion is due.

18 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
19 served on defendants no later than forty-five (45) days from the date defendants' motion is  
20 filed.

21 a. In the event the defendants file an unenumerated motion to dismiss  
22 under Rule 12(b), plaintiff is hereby cautioned as follows:

23 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the  
24 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative  
25 remedies. The motion will, if granted, result in the dismissal of your case. When a party you  
26 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly  
27 supported by declarations (or other sworn testimony) and/or documents, you may not simply  
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1 rely on what your complaint says. Instead, you must set out specific facts in declarations,  
2 depositions, answers to interrogatories, or documents, that contradict the facts shown in the  
3 defendant's declarations and documents and show that you have in fact exhausted your  
4 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if  
5 appropriate, may be granted and the case dismissed.

6 4. Defendants shall file a reply brief no later than fifteen (15) days after  
7 plaintiff's opposition is filed.

8 5. The motion shall be deemed submitted as of the date the reply brief is due. No  
9 hearing will be held on the motion unless the Court so orders at a later date.

10 6. All communications by the plaintiff with the Court must be served on  
11 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy  
12 of the document to defendants or defendants' counsel.

13 7. Discovery may be taken in accordance with the Federal Rules of Civil  
14 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
15 Rule 16-1 is required before the parties may conduct discovery.

16 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
17 court informed of any change of address and must comply with the court's orders in a timely  
18 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
19 pursuant to Federal Rule of Civil Procedure 41(b).

20 9. Extensions of time must be filed no later than the deadline sought to be  
21 extended and must be accompanied by a showing of good cause.

22 10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs  
23 be given "notice of what is required of them in order to oppose" summary judgment motions  
24 at the time of filing of the motions, rather than when the court orders service of process or  
25 otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012).

26 **Defendants shall provide the following notice to plaintiff when they file and serve any**  
27 **motion for summary judgment:**  
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1 The defendants have made a motion for summary judgment by which they seek  
2 to have your case dismissed. A motion for summary judgment under Rule 56  
of the Federal Rules of Civil Procedure will, if granted, end your case.

3 Rule 56 tells you what you must do in order to oppose a motion for summary  
4 judgment. Generally, summary judgment must be granted when there is no  
5 genuine issue of material fact — that is, if there is no real dispute about any  
6 fact that would affect the result of your case, the party who asked for summary  
7 judgment is entitled to judgment as a matter of law, which will end your case.  
8 When a party you are suing makes a motion for summary judgment that is  
9 properly supported by declarations (or other sworn testimony), you cannot  
10 simply rely on what your complaint says. Instead, you must set out specific  
11 facts in declarations, depositions, answers to interrogatories, or authenticated  
12 documents, as provided in Rule 56(e), that contradict the facts shown in the  
13 defendants' declarations and documents and show that there is a genuine issue  
14 of material fact for trial. If you do not submit your own evidence in opposition,  
15 summary judgment, if appropriate, may be entered against you. If summary  
16 judgment is granted, your case will be dismissed and there will be no trial.

17 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

18 **IT IS SO ORDERED.**

19 DATED: February 27, 2014

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RICHARD SEEBORG  
United States District Judge

United States District Court  
For the Northern District of California